Nos. 10-376, 10-377, 10-420

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In The
# Supreme Court of the United States

MARK WRISLEY, *et al.*,

*Petitioners,*

v.

MICHAEL CROWE, *et al.*,

*Respondents.*

CHRISTOPHER McDONOUGH,

*Petitioner,*

v.

MICHAEL CROWE, *et al.*,

*Respondents.*

LAWRENCE N. BLUM,

*Petitioner,*

v.

MICHAEL CROWE, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## CONSOLIDATED BRIEF IN OPPOSITION OF AARON HOUSER, MARGARET SUSAN HOUSER, AND GREGG HOUSER

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## QUESTIONS PRESENTED

Whether Petitioners have presented compelling reasons to grant the petitions, where the Ninth Circuit Court of Appeals correctly held on the record before it that:

1. Use of confessions coerced from juveniles and later introduced in pre-trial proceedings during the course of the "criminal case" violate the Fifth Amendment right against self-incrimination;

2. A police conspiracy to intentionally violate a juvenile's Constitutional rights, with the aim of coercing a confession no matter the human toll, sufficiently "shocks the conscience" to support a violation of the Fourteenth Amendment's due process protections;

3. A clinical psychologist, retained by police to devise strategies and techniques to "psychologically break" juvenile criminal suspects during coercive interrogations, may be held liable for conspiracy to violate those juveniles' constitutional rights.

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## I. INTRODUCTION

There is a climactic scene in the beloved movie classic, *The Wizard of Oz*, where Dorothy and her cohorts return to the Emerald City for an audience with a powerful Wizard who has promised to deliver Dorothy to Kansas, a brain to the Scarecrow, a heart to the Tin Woodsman, and bravery to the Cowardly Lion. When they finally come face to face with the Mighty Oz, the apparition blusters, telling them not to invoke his wrath and to go away. Just then however, Dorothy's dog Toto pulls aside a curtain, revealing nothing more than a slight man operating levers that have only created the illusion of the Wizard. In that unguarded moment, the Mighty Oz admonishes them to "pay no attention to the man behind the curtain," but is ultimately forced to admit that he is little more than a balloonist from Kansas.

Like the Mighty Oz, Petitioners have attempted in their respective petitions to mystify this Court with the look and feel of great erudition, while concealing the humble reality that those petitions present nothing that has not already been decided by this Court and uniformly followed by the Circuit Courts of Appeal. Petitioners also urge this Court to pay no attention to what lies behind their curtain of rhetoric and hyperbole, but Respondents pull it back here to: (A) clarify that no conflict exists among the Circuit Courts which have actually decided the issue confronted by the Ninth Circuit here – the use of coerced confessions in pre-trial proceedings within the "criminal case" after charges have been filed;

(B) illuminate how psychological torture, leveled against 14- and 15-year-old boys, has long been regarded as the basis for a Fourteenth Amendment due process violation; and (C) explain how uniform authority holds that private actors who assist in violating the constitutional rights of others may be held liable for conspiracy. In doing so, Respondents remind this Court of its own relevant decisions and the consistent decisions of the Circuit Courts, all of which demonstrate why review is not warranted here. Accordingly, Respondents urge this Court to deny review in this case where, like that balloonist from Kansas, Petitioners' respective petitions are viewed by this Court for what they really are, and not what Petitioners have projected them to be.

## II. STATEMENT OF THE CASE

For well over a half century – and in two seminal decisions, *Haley v. State of Ohio,* 332 U.S. 596 (1948) and *In re: Gault,* 387 U.S. 1 (1967) – this Court has recognized that juveniles subjected to the strain of custodial police interrogations are "easy victims of the law" and as such, "cannot be judged by the more exacting standards of maturity." It has done so reasoning "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." And it is for that very reason that this Court recognized why "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."

Consequently, this Court has mandated that the police must exercise "the greatest care" in their interrogations of juveniles – not only to assure that any admissions are not coerced – but also to guarantee that they are "not the product of ignorance of rights, or of adolescent fantasy, fright or despair." Similarly, it has instructed reviewing courts to take "special care" in scrutinizing the record where a juvenile's confession is at issue, especially where the totality of circumstances suggest that the minor is "no match for the police in such a contest."

This case poignantly illustrates the reasons for the Court's concern. Indeed, this case is the tragic tale of the police investigation of the murder of 11-year-old Stephanie Crowe, who was viciously stabbed to death in her bedroom by Richard Tuite, a schizophrenic transient with a history of drug use and violent crime. Within a few short hours leading up to that murder, Tuite had been menacing an otherwise quiet neighborhood in rural Escondido, California, in his search for "Tracy," an old girlfriend. His activities understandably prompted several 911 calls to local police officials from anxious neighbors complaining about Tuite's bizarre behavior and attempts to enter their homes looking for "Tracy."

When those police officials finally responded in the late evening hours, they knew Tuite was last seen banging on the door of a home adjacent to where Stephanie Crowe lived. Approaching that location with all lights on his patrol car ablaze, the lone police officer sent to the scene saw a side door to Stephanie's

house inexplicably close as he approached. But without investigating further, that officer turned around, concluded that Tuite was simply "gone on arrival," and then took himself out of service so he could eat dinner.

Having so easily evaded that police officer, Tuite made his way through Stephanie's house and into her bedroom, finally finding someone he believed resembled "Tracy." Tuite then fatally stabbed Stephanie in her bedroom, where she was found slain by her horrified family.

Called to investigate in the morning, the police instantly seized upon a flawed theory that this hideous crime had been committed by a member of Stephanie's family, and not by Tuite. Using a ploy to separate Stephanie's brother and sister from their parents, the police instantly began hammering on Stephanie's 14-year-old brother, Michael Crowe, as their lead suspect. In brazen violation of Michael's rights, the police subjected Michael to prolonged, coerced interrogations, deliberately disregarding his repeated requests to see his parents, to stop the interrogations, and to use the bathroom or to sleep. Enlisting the aid of a clinical psychologist and a "truth box" voice analyzing machine which they knew was merely a sham instrument meant to intimidate and "psychologically break" Michael, the police ultimately wore Michael down, convincing him that he had some sort of pent-up hate of Stephanie that caused him to "black out" and kill her without realizing it.

Yet even after coercing that confession, the police still had a problem. While the evidence continued to point strongly to Tuite as Stephanie's murderer, no physical evidence linked Michael to the crime. Ignoring Tuite, the police cast a dragnet over two of Michael's friends, Joshua Treadway and Aaron Houser (also juveniles), accusing them of being accomplices and co-conspirators. In what one expert would later characterize as "the most extreme form of emotional child abuse that I have ever observed in my nearly 40 years of observing and working with children and adolescents," the police employed the same coercive interrogation techniques to Joshua and Aaron, not to learn or discover the truth, but to browbeat, deceive, threaten and – by any means necessary – coerce them into admitting to their preconceived and factually unsupported theory of how Stephanie was murdered, no matter how strongly the actual evidence pointed toward Tuite.

However, when blood evidence from Tuite's clothing (ignored by the police for a year) was later confirmed to be Stephanie's, charges against Michael, Joshua and Aaron were reluctantly dropped, and Tuite was prosecuted for, and ultimately convicted of, Stephanie's murder. Consequently, Michael, Joshua and Aaron filed suit against the police and related entities, alleging that their civil rights had been repeatedly and intentionally violated by the police to support a ridiculous "theory-based" investigation, and in a concerted effort to provide "cover" for one of their

own who had the last, best chance to stop Tuite, but never even attempted to do so.

While the District Court granted the police summary judgment by measuring their behavior as if they had been dealing with hardened adult criminal suspects, the Ninth Circuit reversed, finding on *de novo* review that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)[1] The Ninth Circuit further held that use of those coerced confessions at various pre-trial hearings – but after charges had been brought against the boys and the "criminal case" commenced – violated their Fifth Amendment right against self-incrimination. (App. 36-45.)

In an attempt to induce this Court's review, Petitioners have offered a highly glossed and sanitized version of the underlying facts. *But it is the unique and compelling facts of this case which make it a particularly unsuitable vehicle for review on the multiple issues raised by Petitioners.* Thus, as Rule 15.2 requires Respondents to point out to the Court any perceived misstatements of fact contained in the underlying petitions, Respondents focus here on the

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[1] All factual references in this Opposition Brief are made to the Appendix of documents attached to the Petition of Mark Wrisley, Barry Sweeney, Ralph Claytor, and Phillip Anderson ("the Escondido Petitioners"), and are abbreviated as: "(App. [page].)"

insufficiencies in that recitation, citing to the underlying opinions of the Ninth Circuit and the District Court.

### A. Summary.

In his separate Opposition Brief, Co-Respondent, Michael Crowe, describes in detail the facts leading up to Tuite's murder of Stephanie, how the circumstantial and physical evidence strongly implicated Tuite from the outset of the investigation, and how no physical evidence whatsoever tied Michael to the murder of his sister. Thus, for the sake of brevity, a full recounting of those facts and circumstances will not be repeated here.

Suffice it to say, however, that within minutes of arriving at the scene, the Escondido police officers investigating Stephanie's murder conspired to pin that hideous crime on a family member, and Michael unfortunately became their target. The problem with that plan was that notwithstanding their ability to "psychologically break" Michael and to coerce a confession from him, *the police could find no physical evidence (including a murder weapon) linking Michael to that crime*. Thus, to justify their own mistreatment of Michael, the investigating officers further conspired to search, arrest and interrogate two of Michael's friends, Joshua Treadway and Aaron Houser, all with the goal of further knuckling under those juveniles to support their "theory-based"

investigation, even as the objective evidence increasingly pointed to Tuite.

### B. January 22, 1998: The Police Interrogate Aaron Houser at His Home.

On January 22, 1998, Petitioners first interrogated Aaron at his residence. (App. 25.) They initially questioned Aaron regarding his relationship with Michael, and his interest in mystical fantasy games and medieval weapons. (*Id.*) Although those questions were clearly intended to elicit incriminating responses from Aaron, the police never warned Aaron (then a 14-year-old with no prior criminal record) of his *Miranda* rights. (*Id.*)

### C. January 27, 1998: The Police Interrogate Aaron Houser Again at His Home and at the Escondido Police Department.

On January 27, 1998, Petitioners executed a search warrant at Aaron's residence, based primarily on prior statements they elicited from him. (App. 25.) During that search, Aaron was confined to his living room and kitchen, except when brought to his bedroom to answer questions. Aaron was then taken to the Escondido police station for further questioning, which lasted nearly two hours. (*Id.*) Again, those interrogations were clearly intended to elicit incriminating responses and were even videotaped for that

purpose, but at no time was Aaron advised of his Fifth Amendment rights. (*Id.*)

### D. January 27, 1998 to January 28, 1998: The Police Interrogate Joshua Treadway For 13 Hours Overnight.

At approximately 7:00 p.m. on January 27, 1998, the Escondido Police began their first grueling interrogation of Joshua, lasting over 13 hours. (App. 29-30.) To begin, Claytor questioned Joshua for several hours, employing various techniques outlined for him by psychologist, Lawrence Blum, meant to coerce Joshua into admitting involvement in a crime that neither he, nor his friends, committed. (*Id.*) Specifically, Claytor baited Joshua with promises of leniency (rehabilitation) and then scared him with threats of punishment (prison). (*Id.*) He also denied Joshua's request to see his mother, denied his request for water, and refused to take him to the bathroom. (*Id.*) Claytor never advised Joshua of his Fifth Amendment rights. (*Id.*)

As Joshua began to show visible signs of strain following Claytor's, Wrisley's and Sweeney's seven hours of grilling, McDonough strategically took over Joshua's interrogation at 3:00 a.m. on January 28, 1998, consistent with the plan the officers and Blum had previously devised to "break" Joshua. (*Id.*) It was at this time that McDonough turned loose on Joshua the "truth box" Computer Voice Stress Analyzer ("CVSA") device. (*Id.*) Notably, McDonough would

later admit he did not know how or if the CVSA worked, but told Joshua in no uncertain terms that the CVSA was "97% accurate," and immediately determines if your answer is right or wrong.

Despite McDonough's onslaught and deception, Joshua initially maintained his innocence. (App. 30.) However, McDonough relentlessly interrogated and psychologically abused Joshua, utilizing the CVSA as the tool of that coercion. Joshua was exhausted and repeatedly asked to be allowed to sleep. (*Id.*) When Joshua ultimately broke down and falsely told McDonough that Aaron gave him the knife used to kill Stephanie – *the only story Joshua discerned would allow him to escape further coercion* – McDonough pretended to administer another CVSA exam, telling Joshua that he had now "passed" the test. (*Id.*) Yet at no time during over 13 hours of interrogation did McDonough "*Mirandize*" Joshua Treadway. (*Id.*)

### E. The Ruse Phone Call to Aaron.

Having "cracked" 15-year-old Joshua, Claytor and Anderson further manipulated Joshua in an unconscionable attempt to obtain a false confession from Aaron. Specifically, they goaded Joshua to call Aaron and to accuse him of complicity in Stephanie's murder while they secretly listened to that phone call. (App. 30.) Aaron, however, denied any involvement, and was emotionally shocked, confused and frightened by that ruse. (*Id.*)

### F. February 10, 1998: The Police Interrogate Joshua For Another 12 Hours.

Having already succeeded in extracting a false story from Joshua that Aaron gave him the knife Michael used to kill Stephanie, McDonough, Claytor and other officers pushed their plan further, deciding to bring Joshua back for another interrogation on February 10, 1998. (App. 30.)

Knowing that Joshua was already vulnerable to their influence and that they could now manipulate Joshua to follow their preconceived script, McDonough and Claytor interrogated Joshua for another 12 hours. (*Id.*) With direction and assistance from Blum, Claytor and McDonough used similar coercive techniques to those utilized on January 28, 1998, with similar results. By the end of that interrogation session, they had Joshua fabricate a fantasy confession in which Aaron stabbed Stephanie with Michael Crowe's help, while he (Joshua) acted as the "lookout." (*Id.*)

Notably, that false confession was so meandering and internally inconsistent – with key facts changing every few moments – that even McDonough doubted it to be true. (*Id.*) Yet this did not deter the officers from arresting Joshua at the conclusion of this second interrogation, *reading him his Miranda rights for the first time*, and booking him into San Diego County Juvenile Hall. (*Id.*)

### G. February 11, 1998: The Police Arrest Aaron at School, Search His Locker and Home, and Interrogate Him For a Third Time.

Using Joshua's false confession of February 10, 1998, as "probable cause," the following day the police searched Aaron's home and his school locker, while they seized Aaron at his school without telling him he was under arrest. (App. 25.)

After Aaron was brought from school to the Escondido Police Department, he was interrogated for a total of nine and one-half hours, primarily by McDonough. (*Id.*) As with Michael and Joshua, McDonough's interrogation of Aaron was psychologically grueling, was based on coercive techniques and strategies tailored by Blum to overtake Aaron's will and to force a false confession, and was justified by Blum telling the officers that Aaron was "a Charles Manson wannabe" and "Charles Manson with an I.Q." (App. 26, 77.) Aaron was also interrogated under false pretenses in that neither he nor his parents were told that Joshua had implicated him in the murder, or that Aaron was even a suspect. (App. 26-28.) As such, Aaron was under the false impression that he was merely assisting the police in their investigation of Michael. (*Id.*)

As with Joshua, McDonough repeatedly deceived Aaron in his attempts to extract a confession. For example, during the interrogation, McDonough asked Aaron to describe "hypothetically" how Michael might

kill Stephanie, how Joshua might, and how Aaron might do so. (*Id.*) To accomplish that goal, McDonough used the CVSA device to "condition" and "suggest" Aaron's responses. (*Id.*) But not only was Aaron's hypothetical description at odds with the evidence of how the killing actually took place, it was completely different from Joshua's fabricated scenario, which also did not match the evidence. Nevertheless, McDonough told Aaron that the CVSA indicated that he was "definitely involved" and that Petitioners had physical evidence against him and would soon uncover more. (*Id.*) McDonough continued that deception by also telling Aaron that Michael and Joshua had said that Aaron helped him kill Stephanie, and that the physical evidence would implicate him. (*Id.*)

Upon realizing for the first time that he had been deceived and was being questioned as a suspect, Aaron demanded that the interrogation stop and asked to use the bathroom. Neither request was honored. (*Id.*) On two additional occasions, Aaron asked to speak with his mother, but was not permitted to do so.[2] (*Id.*) Claytor also denied Aaron the right to speak with his father. (*Id.*) On another occasion, Aaron demanded that the interrogation cease which

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[2] Under California law, a minor subject to custodial interrogation invokes his Fifth Amendment right by asking to see a parent. *People v. Burton*, 6 Cal.3d 375, 383-384 (1971). Upon such a request, before or during questioning, "the police must cease custodial interrogation immediately." *Id.* at 384.

request was likewise denied. (*Id.*) Yet after approximately 11 hours of coercive interrogation in which Aaron maintained his innocence, the police booked him into Juvenile Hall, never having properly advised him of his *Miranda* rights. He was thereafter handcuffed, photographed in the nude, and incarcerated for approximately *eight months*.

### H. Use of the Boys' Statements in the Criminal Cases Against Them.

Statements obtained from the boys during their interrogations were introduced during at least three pre-trial proceedings. (App. 30-31.) First, a "*Dennis H.*" hearing was held and resulted in Aaron and Joshua spending several months in jail awaiting trial.[3] Second, the boys' statements were introduced during subsequent grand jury proceedings, resulting in indictments against all three boys for murder. Finally, the statements were used in a "707 Hearing" to determine if the boys would be tried as juveniles or adults.[4] (*Id.*)

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[3] In California, when a minor is taken into custody by a police officer, he must be released within 48 hours from the time of apprehension unless a petition is filed within that time in a court of competent jurisdiction explaining why the minor should be declared a ward of the court. See Cal. Welf. & Inst. Code § 631; see also *In re: Dennis H.*, 19 Cal.App.3d 350, 354 (1971).

[4] The California Supreme Court has characterized trying a minor as an adult as "the worst punishment the juvenile system is empowered to inflict." *Ramona R. v. Superior Court*, 37 Cal.3d

(Continued on following page)

Notably, at a subsequent suppression hearing, the state court found that most of Michael's statements were the product of a "coercive scheme" by the police and suppressed them. Similarly, the state court suppressed all of Aaron's statements on the grounds that Aaron had never been *Mirandized*, while also suppressing a large portion of Joshua's statements on the same basis. (App. 31-32.)

### I. Dismissals of Indictments and Prosecution of Tuite.

After the case against the boys had been set for trial, pieces of Tuite's clothes (which had been collected but never analyzed when the police first stopped Tuite the day after Stephanie was killed) were examined, the DNA results of which revealed spots of Stephanie's blood. (App. 32-33.) The prosecution then filed a Motion to Dismiss the indictment against the boys. (*Id.*)

### J. The Boys' Subsequent § 1983 Action in the District Court.

After the charges against them were dismissed, the boys and their families filed three separate complaints in state court alleging violations of 42 U.S.C.

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802, 810 (1985); accord *Marcus W. v. Superior Court*, 98 Cal.App.4th 36, 45 (2002) (holding that the privilege against self-incrimination applies in "707 hearings").

§ 1983 and various state law torts. Petitioners removed the complaints to federal court. (App. 33-36.)

Following various motions to dismiss those complaints, the District Court consolidated all three actions and ordered the filing of a Joint First Amended Complaint. (*Id.*) Petitioners then brought over 10 separate motions for summary judgment, which were the subject of substantial, serial briefing in the District Court over a period of four and one-half years. (*Id.*) Prior to Tuite's trial and ultimate conviction for Stephanie's murder, the District Court issued the first of two lengthy opinions on February 17, 2004, finding in substance that Joshua's and Aaron's respective claims for violation of their Fourth, Fifth and Fourteenth Amendment rights did not survive summary judgment. (App. 197-356.)

After Tuite's conviction, the District Court on February 28, 2005 ruled on Michael's and his family's remaining civil rights claims, prompted by a second round of similar motions for summary judgment filed by Petitioners. Following the course it charted with the claims brought by Joshua and Aaron, the District Court also denied Michael any relief on his Fourth, Fifth, and Fourteenth Amendment claims. (App. 90-196.)

### K. The Ninth Circuit's Ruling.

Upon *de novo* review, the Ninth Circuit reversed in part and affirmed in part the District Court's two rulings. Specifically, consistent with this Court's

plurality opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003) – which found a violation of the right against self-incrimination occurs if one has been compelled to be a witness against himself in "any criminal case" – the Ninth Circuit held that all three pre-trial proceedings in which Michael's and Aaron's statements were used were part of the "criminal case" against them and supported a Fifth Amendment cause of action. (App. 36-45.)

The Ninth Circuit similarly reversed the District Court, holding instead that the Petitioners' brutal and coercive conduct – meant to overcome the will of adolescent boys – amounted to "psychological torture" and sufficiently "shocked the conscience" to support a Fourteenth Amendment Due Process claim. (App. 45-48.)

Furthermore, the Ninth Circuit reinstated other claims asserted against McDonough and Blum; the Crowes' deprivation of familial relationship claim based upon Michael's incarceration; and the Housers' deprivation of familial relationship claims based upon Aaron's incarceration. (App. 66-71.)

The Ninth Circuit, however, affirmed summary judgment as to all of Michael's and Aaron's Fourth Amendment violations (related to the existence of probable cause for their arrests and the searches of their homes); the Fourth Amendment conspiracy claim against McDonough; Michael's and Aaron's defamation claims against Prosecutor Stephan; Aaron's defamation claim against Blum; and all

claims against the municipal entity defendants. (App. 48-59, 68, 71-80.)

Finally, the Ninth Circuit affirmed the District Court's denial of summary judgment as to the Crowes' individual claims for Fourth Amendment violations arising out of their respective strip searches and drawing of blood samples; as well as their claims for wrongful detention and deprivation of familial companionship arising out of Michael and his sister, Shannon, being placed in protective custody. (App. 62-66.)

Petitioners thereafter petitioned the Ninth Circuit for rehearing and rehearing *en banc*, both of which were properly denied. (App. 6.)

## III. REASONS FOR DENYING THE PETITIONS

### A. Petitioners' Attempts to Manufacture Review of Respondents' Fifth Amendment Claims Has Recently Been Rejected by This Court and Should Be Rejected Again Now.

The Fifth Amendment provides that no person "shall be compelled *in any criminal case* to be a witness against himself." U.S. Const. amend. V (emph. added). This Court has emphasized that the "sole concern" of the Fifth Amendment is "to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . .

criminal acts.'" *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

Petitioners claim that in the wake of the *Chavez* plurality opinion, there is an alleged "conflict" within the Circuit Courts about when, precisely, a "criminal case" begins. As Respondents here explain, that argument is nothing new, but rather is precisely the same argument the Escondido Petitioners raised as amicus in support of review of the Ninth Circuit's prior decision in *Stoot v. City of Everett,* 582 F.3d 910 (9th Cir. 2009), *cert. denied*, April 5, 2010. This Court rejected those same arguments *just over seven months ago*, and should do so again now.

Moreover, as Respondents further explain, this case presents a uniquely poor vehicle for review of the widespread application of Fifth Amendment protections, as it involves juvenile criminal defendants who this Court has mandated should be subject to different interrogation standards (*i.e.,* "the greatest care" standard under *In re: Gault,* 387 U.S. at 55) than their fully emancipated adult counterparts. Accordingly, as that "greatest care" standard necessarily overlays the Ninth Circuit's Fifth Amendment analysis, this case is an inappropriate platform from which to extrapolate legal concepts meant to apply to a much broader population of criminal defendants.

### 1. The Alleged Split Between the Circuit Courts Does Not Warrant This Court's Attention at This Time.

With great hyperbole, Petitioners claim that a "deep circuit split" exists by relying on decisions from four Circuits – the Third, Fourth, Fifth, and Sixth Circuits. They do so by cherry-picking language from a small collection of cases in those Circuits which have never squarely addressed the "criminal case" question post-*Chavez*, as have the Second, Seventh, and Ninth Circuits. As set forth more fully below, the language on which Petitioners rely either pre-dates *Chavez*, or is *dicta* (not binding on future decisions in those Circuits) wrested from factually distinguishable decisions. Consequently, it remains unclear whether those Circuits would hold differently if they were actually confronted with the same compelling factual scenario presented in this case.

#### a. The Third Circuit.

For example, in the Third Circuit decision of *Renda v. King*, 347 F.3d 550, 553 (3rd Cir. 2003), the plaintiff was charged with giving false reports to law enforcement authorities. The Court of Common Pleas suppressed the plaintiff's statements due to *Miranda* violations and the case was *nolle prossed* by the District Attorney for lack of evidence. *Id.* The plaintiff filed an action pursuant to 42 U.S.C. § 1983 alleging, among other things, a violation of her Fifth Amendment rights. The Third Circuit held that the plaintiff's Fifth Amendment rights were not violated

because her statements were never used against her at trial. *Id.* at 559. In doing so, however, the Third Circuit failed to engage in any substantive analysis of the issue now presented to the Court. The decision simply states on this issue: " . . . our prior decision in *Giuffre* compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.*

Notably, however, *Giuffre v. Bissell,* 31 F.3d 1241 (3rd Cir. 1994), upon which *Renda* relied, was a pre-*Chavez* case. Additionally, as correctly pointed out by the Seventh Circuit in the subsequent, post-*Chavez* decision of *Sornberger v. City of Knoxville, Ill.,* 434 F.3d 1006 (7th Cir. 2006), *Giuffre* was "decided before the Supreme Court determined in *Dickerson v. United States,* 530 U.S. 428 (2000), that the *Miranda* warnings themselves have constitutional status." *Id.* at 1025. The Seventh Circuit concluded therefore that "little weight" should be placed on the holding in *Giuffre,* given that subsequent change in the law. *Id.* Furthermore, *Giuffre* was factually similar to *Chavez* in that officers obtained a statement from the plaintiff during an allegedly coerced interrogation but charges were later dropped prior to the filing of a criminal case. *Id.* at 1244. Here, in contrast, Aaron's coerced statements were used in bringing criminal charges against him, in denying his pre-trial release, and in deciding whether to try him as an adult.

In short, the *Renda* decision relied entirely on a distinguishable pre-*Chavez* decision which failed to

set forth any detailed analysis to support its conclusion that a Fifth Amendment violation occurs only when a statement has been used at *trial*. As such, *Renda* does not present a proverbial "split" among the Circuits at all, let alone one that is sufficiently mature to warrant this Court's attention now. Indeed, faced with facts similar to those presented in this case – and given the guidance this Court has provided since in *Chavez* – it cannot be said with any degree of certainty that the Third Circuit would not agree with the Ninth Circuit's decisions in both *Stoot* and this case.

**b. The Fourth Circuit.**

Similarly, in the Fourth Circuit decision of *Burrell v. Virginia,* 395 F.3d 508, 510 (4th Cir. 2005), an officer approached the plaintiff at a traffic accident scene. When the plaintiff refused to answer any of the officer's questions, he was charged with obstruction of justice and operating an uninsured motor vehicle. *Id.* at 511. When the plaintiff's conviction on those charges was later overturned on appeal, he brought a § 1983 action alleging, among other things, his Fifth Amendment rights were violated by the state compelling him to produce evidence of insurance. *Id.*

The Fourth Circuit analyzed the plaintiff's claim under *Chavez* noting that this Court's plurality conclusion that a violation of the constitutional right of self-incrimination occurs *only* if one has been compelled to be a witness against himself in a criminal

case. *Id.* at 513, citing *Chavez,* 538 U.S. at 770. The *Burrell* court then focused on Justices Souter's and Breyer's concurrence in *Chavez* which concentrated on whether a violation required "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony. . . ." *Id.,* citing *Chavez,* 538 U.S. at 777 (emph. in orig.). Based on that reasoning alone, *Burrell* concluded "[Plaintiff] does not allege any *trial* action that violated his Fifth Amendment rights: thus, *ipso facto,* his claim fails on the plurality's reasoning." *Id.* But closer scrutiny reveals that *Burrell's* statement regarding requirement of a "trial" action is pure *dicta.* Indeed, the plaintiff in *Burrell* never alleged any "courtroom use" of statements since he only asserted a violation occurred at the time summonses were issued by the state. *Id.* Thus, that language, as it related to the question presented by the limited facts of that particular case, went well beyond those facts and consequently, would not be binding on subsequent cases.

In fact, the Seventh Circuit in *Sornberger,* which reached the same conclusion as the Ninth Circuit in this case, explained why that isolated language in *Burrell* created no conflict with its own holding:

> We do not see conflict between our holding today and that of our sister circuit in *Burrell.* There, Burrell claimed that his constitutional rights were violated when the police issued him an obstruction of justice summons for invoking his right to remain silent. The Fourth Circuit held that the issuance of

> a summons was not a "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony," and therefore Burrell failed to state a claim under § 1983 for violation of his right against self-incrimination. Here, by contrast, Teresa's confession was used at a preliminary hearing to find probable cause to indict, to arraign and to set her bail. More than the mere issuance of a summons, failure to administer Teresa *Miranda* warnings led to three distinct "courtroom uses" of her unwarned statements.

*Sornberger,* 434 F.3d at 1027.

Consequently, it is entirely unclear whether the Fourth Circuit would hold differently given the facts of this case. Indeed, like the situation in *Sornberger* and unlike the situation in *Burrell,* the coerced statements used against Aaron formed the basis for filing formal charges against him, were used to determine his pre-trial custody status, and led to Aaron being tried as an adult, all "courtroom uses." As such, the "courtroom use" of the statement that was entirely lacking in *Burrell* is fully present in this case, as it was in *Sornberger*. Accordingly, the Fourth Circuit's decision in *Burrell* does not present a split among the Circuits, but must be viewed as limited to the facts before it, which are clearly distinguishable from those found in this case.

### c. The Fifth Circuit.

In the Fifth Circuit's decision of *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), the plaintiff (a juvenile) was charged with capital murder and injury to a child. The plaintiff's statements, obtained without taking her before a magistrate or notifying her parents or an attorney as required by Texas law, were used against her during two different trials leading to her conviction. *Id.* at 284. The Texas Court of Appeals, however, reversed those convictions due to improperly acquired statements. *Id.* The plaintiff subsequently brought a § 1983 action alleging, among other things, a violation of her Fifth Amendment rights. *Id.*

When the plaintiff challenged the trial court's grant of qualified immunity, the Fifth Circuit stated: "The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." *Id.* at 285. The *Murray* court, however, provided no analysis regarding the question presented in this case, or clarified by the *Chavez* plurality: *pre-trial use of coerced statements within the criminal case*. Indeed, as in *Burrell,* that statement was circumscribed by the facts before it, as the plaintiff's confession in *Murray* had, in fact, been used *two different times* against her at trial. *Id.* at 284. Thus, *Murray* cannot be reasonably construed as going beyond its limited facts to reach a scenario where, like here, those same self-incriminating

statements are used in various pre-trial proceedings which implicate substantial liberty interests. Indeed, if confronted with the significantly distinguishable facts present in this case, it is unclear whether the Fifth Circuit would hold any different than the Ninth Circuit did in this case, or be bound by the factually dissimilar situation presented in *Murray*.

**d. The Sixth Circuit.**

Finally, in *McKinley v. City of Mansfield,* 404 F.3d 418, 425 (6th Cir. 2005), the self-incriminating statements in question were introduced at trial and played a "central role" in the plaintiff's conviction. Consequently, the *McKinley* court's recitation of the rule (in a mere footnote, no less) that the Fifth Amendment is a "trial protection" right was appropriate on the limited facts before it. But it does nothing to require a similar holding where another court in the Sixth Circuit is later confronted with the facts present in this case: pre-trial use of a self-incriminating statement within the confines of the criminal case.

Again, like the decision of the Fourth Circuit in *Burrell,* and the Fifth Circuit in *Murray,* the Sixth Circuit's mere recitation in *McKinley* of a "trial protection" rule – without any further analysis – does not define the contours of the Fifth Amendment in that Circuit, but must instead be viewed within the limited facts presented to the *McKinley* court. Indeed, none of the decisions on which Petitioners rely have

squarely addressed the different factual situation present here, and none would prohibit another court from ruling exactly as the Ninth Circuit did in this case if they are confronted with those distinguishable facts in the future.

In contrast, every Circuit which has squarely addressed pre-trial use of self-incriminating statements in the "criminal case" has uniformly followed this Court's guidance in *Chavez* and found such use to violate the Fifth Amendment. See, *e.g.*, *Sornberger,* 434 F.3d at 1026; *Higazy v. Templeton,* 505 F.3d 161, 172 (2nd Cir. 2007); *Stoot,* 582 F.3d at 925-926. There is no reason to believe the results would be any different if (and when) the Third, Fourth, Fifth and Sixth Circuits have the opportunity to confront that same issue. But until they do – and render a decision on similar facts which is actually at odds with the decisions of the Second, Seventh, and Ninth Circuits – any alleged "conflict" raised by the Petitioners is simply non-existent, let alone sufficiently mature at this juncture to warrant this Court's attention.

### 2. The Compelling Facts of This Case Make It a Uniquely Poor Vehicle for Review of the Widespread Application of Fifth Amendment Protections.

As mentioned at the outset of this brief, one of the most compelling aspects of this case is that it involves juveniles (boys, ages 14 and 15) – with no

prior criminal history or contact with the police – who were subjected to hours of coercive interrogation *before* they were ever apprised of their *Miranda* rights. While Petitioners pay lip service to this fact, they just as quickly go on *to forget* Respondents' relative youth, condoning inquisitorial techniques and practices which have been found to be appropriate, if at all, for adult criminal suspects.

But the standards for exercising the "greatest care" in analyzing police interrogations of juveniles are well-established, and run directly contrary to the authority relied upon by Petitioners. Indeed, as this Court made clear over a half-century ago in *In re: Gault*:

> We appreciate that *special problems* may arise with respect to waiver of the [Fifth Amendment] privilege by or on behalf of children, and that there may well be some differences in technique – but not in principle – depending upon the age of the child and the presence and competence of parents . . . , the *greatest care* must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

*In re: Gault*, 387 U.S. at 55 (emph. added).

There can be no doubt that those "special problems" – as well as the established body of law from this Court and others which deal specifically with the

care which must be afforded juvenile criminal defendants in custodial interrogations – properly influenced the Ninth Circuit's analysis of Aaron's Fifth Amendment claims, and would do the same if this Court were to review this case. Consequently, the "special problems" inherent in addressing a juvenile case, and the unique and compelling factual issues involved in this case, make it an inappropriate vehicle for resolving the questions presented.

### 3. Petitioners' Claim That the Ninth Circuit's Decision Will Have a "Chilling Effect" on Law Enforcement Activities Is Supported Neither By Fact Nor Law.

In a reprise of the unsuccessful arguments they offered in the *Stoot* case, Petitioners again argue the Ninth Circuit's decision in this case will have a "chilling effect" on law enforcement activities. Specifically, Petitioners suggest that the Ninth Circuit's opinion creates an unworkable standard that will expose law enforcement officers to unnecessary lawsuits and civil liability, blithely characterizing this case as involving "garden variety" interrogation techniques, even where juveniles were involved.

Those arguments, however, presuppose that law enforcement officers do not have to follow rules applicable to interrogations and that if they do not, there will be no repercussions. To the contrary, this Court's precedent, beginning with *Miranda* and

continuing to the present day, sets forth clear requirements for a proper interrogation. A law enforcement officer must follow those rules or face the consequences.

Here, the record aptly demonstrates how time and again, Petitioners deliberately flouted those rules by interrogating Michael and Aaron for hours, and only *Mirandizing* them at the end of those interrogations *after* they had overcome the boys' will and secured the confessions they were seeking. Consequently, Petitioners' arguments about the need for "proper guidelines" rings hollow when the record shows how *they deliberately violated the guidelines this Court has already provided in myriad cases.* Moreover, at the time Petitioners took that action, it was firmly established in the Ninth Circuit that the defense of qualified immunity is not available to police officers who knowingly violate the law. *Cooper v. Dupnick,* 963 F.2d 1220, 1251 (9th Cir. 1992), overruled on other grounds in *Chavez,* 538 U.S. 760. Rather than justifying protection for the proper exercise of their duties, when law enforcement officials act as they have in this case, "they invite redress under section 1983." *Id.* at 1252.

Petitioners' fall-back position – that the police cannot, as a matter of law, be found liable for any Fifth Amendment violation where prosecutors (and not they) introduce those coerced statements at trial – merits even less consideration. Such an argument lacks *any* legal support, and, in fact, has been squarely rejected by the very authority cited by

Petitioners. See *McKinley,* 404 F.3d at 436-437, fn. 23 (addressing the District Court's decision in this case and finding its reasoning wholly "unpersuasive"). *McKinley* then cited a long train of authority – including *Chavez* – where it has never been questioned that the police may be held liable under § 1983 for violating someone's Fifth Amendment rights. *Id.*

Indeed, as both the Sixth Circuit in *McKinley* and the Ninth Circuit in this case properly concluded, a rule barring suits against the police for Fifth Amendment violations *is a rule barring any suits for Fifth Amendment violations*, given that prosecutors are *absolutely immune* from suit for their conduct as advocates within the judicial process. *Id.* at 437-438, citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

But it cannot be – and in fact, has never been – that invasions of the right against compelled self-incrimination are not actionable. Consequently, Petitioners' assertions to the contrary should be rejected by this Court on that basis alone. (App. 42-44.)

In sum, as freedom from compulsion lies at the heart of the Fifth Amendment, no purpose would be advanced by making the police immune, as a matter of law, from the protections that Amendment provides. Indeed, if this were the case, the police would only be *encouraged* to compel coerced and self-incriminating statements with complete impunity. Surely, such a result would be wholly contrary to a

long train of well-settled authority meant to regulate and discourage such police misconduct under the aegis of the Fifth Amendment.

### B. Petitioners' Arguments That There Is a Need to Clarify "Conscience Shocking" Behavior Under the Fourteenth Amendment Also Fails to Raise an Issue Worthy of This Court's Review.

#### 1. This Court's Decisions Are Replete with Examples of Verbally Coercive Interrogations Which Violate the Fourteenth Amendment.

Petitioners assert that the Ninth Circuit's opinion in this case creates uncertainty and confusion about what conduct is sufficiently "conscience shocking" to warrant Fourteenth Amendment liability. They premise that argument on the assertion that "verbal" coercion and deception should not be enough, even where juveniles are the target of that coercion.

But over a half-century ago in *Haley*, this Court found that a 15-year-old boy – *based upon verbal coercion alone* – was necessarily ill-equipped to withstand an overnight police interrogation resulting in his coerced confession. *Haley*, 332 U.S. at 599-600. Writing for the Court, Justice Douglas reasoned that such a juvenile "cannot be judged by the more exacting standards of the law," and further observed "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early

teens." *Id.* Recognizing both that such a boy "questioned through the dead of night by relays of police, is a ready victim of the inquisition," and that while "mature men possibly might stand the ordeal . . . a lad of tender years is no match for the police in such a contest," the *Haley* court demanded that "*special care* in scrutinizing the record must be used" in order to protect the constitutional rights of juveniles, and to prevent the police from using custodial interrogations for "wringing confessions from them." *Id.* at 599-601 (emph. added).

Not 14 years later, in *Gallegos v. Colorado,* 370 U.S. 49 (1962), this Court was again called upon to scrutinize a confession wrought from a juvenile in the course of a custodial police interrogation. Finding that the youth of the accused – 14 years old – was a "crucial factor" in determining whether due process violations had occurred, the *Gallegos* court reasoned:

> [A] 14 year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interests or how to get the benefit of his constitutional rights.

*Id.* at 1212.

Over the prosecution's continuing assertion that such youth and immaturity were "irrelevant" in light

of the allegedly "voluntary" nature of the confession made, the *Gallegos* court retorted:

> But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses, and knowledgeable of the consequences of his admissions.

*Id.* at 1212-1213.

Consequently, *Gallegos*, like *Haley* before it, concluded that "the formal confession on which this conviction may have rested was obtained in violation of due process." *Id.* at 1213.

Not four years later, the Court in *In re: Gault*, 387 U.S. 1, again stressed the importance that youth plays in determining whether a confession is coerced, and echoed the mandate that "the *greatest care*" must be taken to assure that juvenile confessions are "voluntary, in the sense not only that [they are] not coerced or suggested, but also that [they are] not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Gault,* 387 U.S. at 55 (emph. added). That "greatest care" standard was based upon this Court's review of several lower court decisions confirming how juvenile confessions are often "the product of fear and fatigue due to extensive police grilling," and how "the frightening atmosphere of a police station is likely to have a harmful effect on the mind and will of the boy." *Id.* at 52-53 (internal quotes omitted). And so the *Gault* court, too,

concluded with the continuing recognition that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *Id.*

In the several decades since *Haley, Gallegos*, and *Gault*, other courts have universally followed this same line of reasoning, insisting that the law view juveniles differently than their adult counterparts.[5] Most notably, however, is the fact that the police conduct in those cases was "verbal," as it was in this case. Indeed, as this Court has repeated many times, coercion can be mental as well as physical, as "the blood of the accused is not the only hallmark of an

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[5] See, *e.g.*, *Woods v. Clusen*, 794 F.2d 293, 296-298 (7th Cir. 1986), (finding that various coercive police techniques – relays of police interrogators, lying about the state of the evidence, promises of leniency – violated a 16-year-old's Fourteenth Amendment rights, given his relative age, experience, and education); *Taylor v. Maddox*, 366 F.3d 992, 1013-1016 (9th Cir. 2004) (applying *Haley's "greatest care"* standard to reject a coerced confession wrought from a 16-year-old juvenile and ultimately finding that the police had clearly violated the juvenile's Fourteenth Amendment rights. Secondary authority is also in accord. See 87 A.L.R.2d 624, *Voluntariness and Admissibility of Minor's Confessions*; 82 N.C.L. Rev. 891, 944, *The Problem of False Confessions in the Post-DNA World*; see also 30 N.Y.U. Rev.L. & Soc. Change 209, *The Reality of False Confessions – Lessons of the Central Park Jogger Case* (recounting in chilling detail how and why five juvenile boys subjected to heavy-handed police interrogation techniques confessed their involvement in an infamous crime they did not commit, and were prosecuted and convicted on the basis of those confessions alone, until the real killer, a serial rapist and convicted murderer, confessed to the crime some thirteen years later.)

unconstitutional inquisition." See, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Reck v. Pate*, 367 U.S. 433, 440-441 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

Here, the Ninth Circuit concluded from the record before it that Michael's and Aaron's confessions were the product of "psychological torture," and that "[o]ne need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case 'shocks the conscience.'" (App. 47.)

On that record, and in light of the clearly established standards governing even verbal coercion which run through myriad decisions of this Court, there is absolutely no need for this Court's intervention at this time.

### 2. Petitioners' Companion "Shocks the Conscience" Arguments Warrant Even Less Scrutiny by This Court.

Petitioners badly mischaracterize the Ninth Circuit's opinion and the record below to float two companion arguments, neither of which warrants this Court's review. Specifically, Petitioners assert that a Fifth Amendment violation based upon coercive interrogation techniques, and a Fourteenth Amendment violation based upon deprivation of familial companionship, cannot be found absent conscience shocking behavior.

But those arguments belie the fact that the Ninth Circuit, in finding that Petitioners violated Michael's and Aaron's Fifth Amendment rights, necessarily relied upon the same conscience shocking behavior that also formed the basis for Petitioners' violation of the boys' Fourteenth Amendment rights. In other words, the same coercive interrogation techniques employed by Petitioners amounted to violations of *both* Constitutional protections, given the egregious nature of that conduct. That this is so does not indicate that this case is at variance with any other decisions, but merely reflects the compelling facts which were before the Ninth Circuit, implicating both Fifth Amendment and Fourteenth Amendment protections.

Similarly, Petitioners' assertion that a deprivation of familial companionship claim under the Fourteenth Amendment requires conscience shocking behavior – and not mere "unwarranted interference" – is also an inadequate grounds for review. Indeed, in this case, it was the Petitioners' conscience shocking and coercive interrogation tactics which the Ninth Circuit found to have caused Aaron's wrongful incarceration and concomitant separation from his family. (See App. 69 ["Because Michael's and Aaron's continued detentions were wrongfully justified by their illegally coerced confessions, we reverse"].) Thus, although the Ninth Circuit applied the proper standard in reinstating that familial relationship claim, even if it were to have applied the "conscience shocking standard" Petitioners espouse, *the outcome would*

*have been exactly the same*. Accordingly, there is no reason for this Court to intervene on facts which would compel the same outcome, irrespective of the standard applied.

### C. The Ninth Circuit's Reversal of Summary Judgment on the Conspiracy Claim Asserted Against Blum Was Entirely Fact-Driven and Therefore Presents No Legal Issue for This Court to Clarify.

Blum's individual argument – that as a private citizen, he cannot be held liable for conspiracy to violate Michael's and Aaron's constitutional rights – is presented without regard to the controlling standard of review at summary judgment. Indeed, Blum recites at length improper factual findings made by the District Court as if they had been made after trial. In contrast, the Ninth Circuit simply determined that genuine questions of material fact exist regarding the level and extent of Blum's involvement which could not be determined at summary judgment, and reversed the District Court on that basis. (App. 66-68.)

Rather than running contrary to this Court's decision in *Richardson v. McKnight,* 521 U.S. 399, 412 (1997), that conclusion by the Ninth Circuit only confirms that Blum is not automatically entitled to § 1983 immunity merely because he is a private individual, as was his primary argument on appeal. Moreover, as Blum's own petition reveals, such a

holding is not a matter of controversy, but has been echoed in the decisions of "nearly every other Circuit Court" which has considered the issue. Thus, the compulsion for this Court's review is clearly lacking.

Perhaps more importantly, however, is the fact that the Ninth Circuit did not deny Blum qualified immunity based upon a "blanket prohibition" that private actors are never entitled to such immunity, as Blum contends. Indeed, the cases which Blum cites hold to the contrary. See, *e.g., Franklin v. Fox,* 312 F.3d 423, 445 (9th Cir. 2002) (which Blum claims applied a "blanket denial of qualified immunity to [a] private individual," but which instead upheld the district court's grant of summary judgment upon a finding that no evidentiary basis existed for the conspiracy claim the plaintiff had asserted as the sole basis for § 1983 liability against that individual); *Clement v. City of Glendale,* 518 F.3d 1090, 1096-1097 (9th Cir. 2008) (which Blum also asserts demonstrates the Ninth Circuit's trend of "blanket denial" of qualified immunity to private individuals, but which instead extended immunity to a private towing company under *Richardson's* "good faith" defense to § 1983 liability).

In any event, notwithstanding whatever post-*Richardson* "blanket prohibition" Blum believes he may have discerned from those decisions, *no such automatic rule played any role here.* Instead, the Ninth Circuit simply concluded that the record evidence regarding Blum's involvement raised factual

questions which could not be properly determined at summary judgment:

> The record shows that the quality of Blum's involvement in the interrogations is not categorically inconsistent with a tacit "meeting of the minds." According to one of the detectives, Blum helped the police formulate a "tactical plan" to approach the interview. Moreover, the detectives "pretty much" followed his advice after these consultations. Insofar as these tactics and lines of questioning by the detectives shock the conscience, as demonstrated above, summary judgment in favor of Blum is unwarranted.

(App. 67.)

Thus, in determining that a meeting of the minds could be inferred from the circumstantial evidence (including Blum's involvement in the interrogations and in formulating and directing the tactical plan), the Ninth Circuit reasoned that the evidence was sufficient for a reasonable factfinder to conclude it was "unlikely to have been undertaken without an agreement." (App. 67-68.) On that basis alone, the Ninth Circuit quite correctly reversed summary judgment as to Blum. There is nothing controversial about that proper application of well-settled summary judgment standards. Consequently, there is no issue of law for this Court to clarify now.

## IV. CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their various petitions. For the foregoing reasons, Respondents respectfully request this Court to deny those petitions.

Respectfully submitted,

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